

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MATHEW MAXSON)	
Claimant)	
VS.)	
)	Docket No. 251,459
TOTAL MANAGEMENT SERVICES)	
Respondent)	
AND)	
)	
UNKNOWN)	
Insurance Carrier)	

ORDER

Respondent requested Appeals Board review of Administrative Law Judge John D. Clark's March 14, 2000, preliminary hearing Order.

ISSUES

Claimant was injured sometime between the time he closed the respondent's convenient store at 12:40 a.m. on January 21, 2000, and 2:24 a.m., the time noted on the Via Christi Regional Medical Center, St. Francis Campus, medical records where claimant was first treated for his injuries. Claimant alleges he was attacked by two men, after he had closed the respondent's convenient store, while he was taking the trash out to the trash dumpster located on the east side of the respondent's building. Claimant was knocked unconscious from the attack. He was robbed and suffered injuries to his head and neck.

The Administrative Law Judge found claimant's injuries arose out of and in the course of his employment with respondent. The Administrative Law Judge ordered the respondent to pay all past medical expenses, furnish further medical treatment for claimant's injuries, and to pay temporary total disability compensation to claimant from the date of accident until he is released for substantial gainful employment.

On appeal, respondent contends it proved through the contradictory testimony of the store's manager and another employee of respondent that claimant was attacked after

he left the store's premises as he was walking down an alley on his way home from work. Accordingly, respondent argues that claimant's injuries did not arise out of and in the course his employment because he was attacked on his way home after leaving his employment.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the respondent's brief, the Appeals Board concludes the preliminary hearing Order should be affirmed.

On January 21, 2000, claimant was employed as a store clerk at the Total gas station and convenient store located in Wichita, Kansas. Claimant had the responsibility of closing the convenient store at midnight on January 21, 2000. This consisted of cleaning up the inside of the store and emptying the trash. At approximately 12:40 a.m., claimant testified he locked the store doors and proceeded to take the trash to the dumpster located at the northeast corner of the store building. This was the last duty claimant had to perform before he was off work and could go to his home located two blocks from the store.

At the time of closing, claimant had been working with another employee, Jennifer Burley. Also present was Tony Mower, an employee of the respondent, but who was not on duty at this time. Claimant testified both of those individuals had left approximately five minutes before claimant locked the door and proceeded to take the trash to the dumpster.

Claimant testified, before he got to the trash dumpster, two men jumped him, hit him on the head, and knocked him unconscious. The men then proceeded to take \$50 and two credit cards out of his wallet. Claimant was found about 1:45 a.m. and was taken by ambulance to the emergency room at Via Christi Regional Medical Center, St. Francis Campus.

On the date of the preliminary hearing, claimant had not been released from medical treatment to return to work. Because he was not working or receiving any benefits, claimant was evicted from his apartment. He had to move to Dallas, Texas, where he was presently living with family members.

Tony L. Mower also was employed as a store clerk for the respondent on the day of the attack. Mr. Mower testified he was at the store when claimant closed at midnight on January 21, 2000. At that time, Mr. Mower was not on duty, but he had come to the store to check on the training of a new employee, Jennifer Burley. Mr. Mower testified the reason he was checking on Ms. Burley's training was because he had recently been notified he was to be the assistant manager of this store.

¹See K.S.A. 1999 Supp. 44-508(f).

Mr. Mower testified he, Ms. Burley, and the claimant all left the store at the same time. Claimant locked the store's front door and proceeded to walk away from the store toward the liquor store that is located on the opposite side of the store building from the trash dumpster. Mr. Mower testified claimant did not have any trash with him when he left the store. In fact, Mr. Mower testified claimant had taken the trash out before all three of them left the store. After Mr. Mower and Ms. Burley left the store, they got into Ms. Burley's car, and she gave Mr. Mower a ride home. Mr. Mower did not know claimant had been attacked until the next day.

Also, testifying, on behalf of the respondent, was the store manager Kimberly Shoemake. Ms. Shoemake was notified claimant had been attacked and injured, at approximately 2:00 a.m. on January 21, 2000, by respondent's security company. The security company notified Ms. Shoemake that the police wanted her to come down and open the store. Because the claimant had been found with the store keys on him, the police wanted to make sure that no one had opened the store after the attack.

Ms. Shoemake went to the store and, with the police, reviewed the store surveillance video tape to insure that no one had entered the store. Ms. Shoemake testified the video tape showed all three employees leaving the store at the same time by the front door. She did not see any of the employees with trash.

Ms. Shoemake also testified claimant telephoned her the next day from the hospital. She testified the claimant told her that all three of the employees had left the store at the same time. The claimant then said he walked home by the liquor store and down the same alley as he did every night. Ms. Shoemake testified claimant told her, as he was walking down the alley before he reached home, two guys attacked him in the alley.

The preliminary hearing record definitely contains conflicting testimony. All three witnesses testified before the Administrative Law Judge at the preliminary hearing. The Administrative Law Judge had the opportunity to evaluate the credibility of all the witnesses. By finding claimant's injuries arose out of and in the course of his employment and granting claimant's request for benefits, the Administrative Law Judge obviously believed claimant's story. The Appeals Board finds, as it has on many other occasions, some deference should be given to the Administrative Law Judge's findings and conclusions because he had the opportunity to assess all the witnesses' credibility.

The Appeals Board, therefore, at the this juncture of the proceedings, finds claimant proved the attack and his injuries arose out of and in the course of employment with the respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's March 14, 2000, preliminary hearing Order should be, and it is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Matthew J. Thiesing, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director